IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/01/2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1379 OF 1999 AND SECOND APPEAL NO. 1380 OF 1999
AND
C.M.P.No.14623 OF 1999.

1.Tmt.Basamma
2.Sarojamma
3.Saradha .. Appellants in both S.As.

-Vs-

S.Jethendraiah .. Respondent in both S.As.

Second Appeals preferred under Section 100 of the Code of Civil Procedure for the reliefs as stated therein.

!For appellants : Mr.M.V.Krishnan

^For respondent : Mr.V.Raghavachari

:COMMON JUDGMENT

The above Second Appeals are directed against the common judgment and decrees dated 30.11.1998 rendered in A.S.No.8 of 1998 and Cross Appeal No.2 of 1998 by the Court of Subordinate Judge, Hosur thereby allowing the cross appeal and dismissing the Appeal Suit both preferred against the judgment and decree dated 19.12.1997 rendered in O.S.No.8 09 of 1993 by the Court of District Munsif, Denkanikottai.

2. Tracing the history of the above second appeals coming to be preferred by the defendants in the suit, it comes to be known that the respondent herein has filed the suit in O.S.No.809 of 1993 before the Court of District Munsif, Denkanikottai originally against one Choodegowdu (on whose death, his legal representatives i.e. his wife and the daughters, the appellants herein, were brought on record) for declaration of his title to the suit lands in S.Nos.150/7 and 136/4 in Jawalagiri Taraff village, Denkanikottai Taluk, Dharmapuri District and for permanent injunction restraining the defendants from interfering or meddling with his possession, title and enjoyment of the said properties.

3. In the plaint filed before the trial Court, the respondent/ plaintiff would submit that the suit properties are ancestral in nature and he is in possession and enjoyment of the same having inherited from his father Siddegowdu and grand-father Dhoddegowdu and patta also stood in his name. He

would further submit that the deceased first defendant is the son of the concubine of his grandfather Dhoddegowdu and he has no right in the said property; that in the suit S.No.150/7 his grand-father had constructed a house on the southern side of the same and the area occupied by the house would be about 0.04 cents and in that house, from the time of the plaintiff's grandfather, the deceased first defendant was living and as such, the plaintiff has not claimed any right over the said 0.04 cents of land, but the rest of area of 0.72 cents in the said S.No.150/7 belongs to the plaintiff and is in his actual possession and enjoyment; that even during the updating survey, while the lands were measured and patta was granted to the plaintiff for the suit land, the deceased first defendant did not raise any objection since he has no title much less any possession and the pattas granted to the plaintiff for the suit lands have also become absolute and final and as such the defendant who is aware of the same is estopped from questioning the validity of the patta for the suit lands much less the title of the plaintiff in the suit.

4. The further case of the plaintiff is that the deceased first defendant had his lands to the North of S.No.136/4 which he has sold away and the purchasers are in possession of the same and the defendant does not have any lands now and therefore he requested the plaintiff to give him some lands and since the plaintiff refused the said request, the deceased first defendant threatened the plaintiff that he would trespass into the suit lands and in fact on 30.7.1992, when the plaintiff was in the fields, the deceased first defendant came armed with deadly weapons and attempted to trespass into the suit properties and hence the suit.

5. This suit was resisted by the defendants thereby denying all the allegations of the plaint and further submitting that the plaintiff was never in possession and enjoyment of the suit properties; that the plaintiff had changed the patta in his name in connivance with the Village Administrative Officer and that the deceased first defendant was the legitimate son of the grandfather of the plaintiff by name Dhoddegowdu.

6. Based on the above rival pleadings of the parties, the trial Court would frame the following issues for determination of all the questions involved in the suit:
1. Whether the plaintiff was not in possession of the suit properties at the time of filing the suit?
2. Whether the suit properties were not ancestral to the plaintiff?
3. Whether the deceased first defendant was the legitimate son of the second wife of the Dhoddegowdu and whether on 30.7.1992 the defendant trespassed into the suit properties?
4. What relief the plaintiff is entitled to?

7. Thereupon, the Court below would conduct a trial wherein, the plaintiff, besides examining himself as P.W.1 for oral evidence would also examine one Sivanandam, Junior Assistant of the Taluk Office, Denkanikottai as P.W.2 and one Madhevappa as P.W.3 for oral evidence and would mark 29 documents for documentary evidence as Exs.A.1 to A.29. Ex.A.1 dated 28.11.1996 is the UDR Patta No.879 standing in the name of the father of the

plaintiff by name Siddhe Gowdu and one Soodamma. Ex.A.2 dated 28.11.1996 is the proceeding of the Deputy Tahsildar, Denkanikottai, Exs.A.3 to A.11 are the kist receipts, Ex.A.12 is the Chitta Extract for Old Patta No.101, Ex.A.13 is the Chitta Extract for UDR patta No.50 and Exs.A.14 to A.29 are the adangal extracts. On the contrary, on behalf of the defendants, the second appellant herein by name Sarojamma besides examining herself as D.W.1 would also examine three witnesses viz. Venkatareddy, Nanjappa and Chandrasekar as D.Ws.2 to 4 respectively for oral evidence. But, no documentary evidence would be adduced on behalf of the defendants.

8. The trial Court, in consideration of these evidence placed on record and having held that the deceased first defendant was the illegitimate son of Dhoddegowdu and has decreed the suit insofar as the prayer for declaration is concerned. But, regarding the prayer of permanent injunction, the trial Court would dismiss the suit on ground that the plaintiff had not proved the possession of the suit properties.

9. Aggrieved, the defendants to the suit preferred an appeal in A.S.No.8 of 1998 before the Court of Subordinate Judge, Hosur and the plaintiff preferred a cross Appeal No.2 of 1998 and the Court of first appeal having taken up the appeal suit and the Cross Appeal for common disposal would frame the following points:

1. Whether the plaintiff is entitled to the relief of declaration and permanent injunction as sought for?
2. Whether it is true that the plaint schedule properties devolved on the defendants in partition and they are in possession of the same?
3. Whether the trial Court is correct in not granting the relief of permanent injunction while granting the relief of declaration?
4. Whether the trial Court, while dismissing the plea of permanent injunction, should have also dismissed the plea of declaration?

10. Thereupon, the first appellate Court, having had its own discussions, would ultimately dismiss the appeal preferred by the defendants, further allowing the cross appeal preferred by the plaintiff and granting the relief of permanent injunction also in favour of the plaintiff, which the trial Court declined to grant. Aggrieved against the said common judgment of the first appellate Court, the defendants in the suit have come forward to prefer the above second appeals on certain grounds as brought forth in the grounds of appeals further raising the following questions as substantial questions of law:

1. Whether the learned Subordinate Judge has failed to see that the burden of proving the title to the suit property was entirely on the plaintiff?
2. Whether the learned Subordinate Judge has erred in rejecting the entire oral evidence of P.Ws.1 to 3 and D.Ws.1 to 4 on the ground that the oral evidence should not be given any importance and is it not contrary to the law of Evidence?
3. Whether the learned Subordinate Judge has failed to consider the admission of the plaintiff that the 4 cents of land was allotted to the first defendant's mother and she had constructed a house thereon?
4. Whether the plaintiff and his ancestors, who are village officers and issued kist receipts to the defendants for the suit lands are estopped from

denying the defendants' title?

11. In the crisp arguments advanced on the part of the learned counsel appearing on behalf of the appellants, he would submit that it is an admitted case on the part of the respondent/plaintiff himself that the appellant was born to his grandfather but not from out of a valid marriage and throughout the deceased first defendant's mother was kept only as a concubine and hence the property being ancestral in nature the deceased first defendant was not entitled to get a share in the suit property further admitting the possession of the house in one of the suit properties but disputing the possession of the land surrounded by the defendants; that the contention of the plaintiff is that the first defendant was the illegitimate child having been born not through a regular marriage held in between his grandfather and the first defendant's mother but only through an irregular and illegal marriage; that it had all happened in the year 1928 when the second marriage was valid but the trial Court without any iota of proof produced on the part of the plaintiff to the plea taken that the deceased first defendant was not born from out of legal marriage, had bluntly held that the second marriage was invalid; that however, even without realising the admitted fact on the part of the plaintiff that there had been long cohabitation in between his grandfather and the mother of the deceased first defendant, both the Courts below have decided the issue simply throwing the burden on the defendant as though it was the plea taken by the defendant which is preposterous and illegal; that in the year 1928, the deceased first defendant had got the right of property and that he would get half share in all the properties.

12. At this juncture, the learned counsel for the appellants would cite a judgment delivered in RAGHUVIRKUMAR vs. SHANMUGHAVADIVU AND OTHERS reported in 1970-2-MLJ 193. In this case, when a Hindu by name Palaniswamy married a second wife from outside his community in the year 1943, when his earlier marriage was subsisting, and kept it as a secret and afterwards and when a question was raised regarding the legitimacy of the children of the second wife, a Division Bench of this Court has held:

"There was no bar for the deceased Palaniswamy to take a second wife in the year 1943 when the marriage between Palaniswamy and the second plaintiff is said to have taken place. In a society where second marriage is not prohibited under the statute or under the customary law, it is always open for any person to marry a second wife if he so desires and if he goes through a form of marriage and lives with the other party as husband and wife, there is no obstacle to the presumption being raised from the fact of long cohabitation and repute. Of course, if there is a statute such as the Madras Bigamy Prevention Act, 1949 or the Hindu Marriage Act, 1955, a second marriage cannot be presumed from long cohabitation and repute, as such a marriage cannot be

recognised in law. The mere fact that there was an earlier marriage subsisting in this case it cannot be considered sufficient to rebut the presumption of marriage arising out of long cohabitation and repute."

Citing the above judgment, the learned counsel for the appellants would pray

to allow both the above second appeals.

13. On the contrary, on the part of the learned counsel appearing for the respondent, he would submit that the first appellate Court has considered all the facts and circumstances of the case in the manner required by law and would submit that the defendants have not established the marriage of the mother of the deceased first defendant with the grandfather of the plaintiff. At this juncture, the learned counsel for the respondent would cite two judgments, the first one delivered in K.MUNUSWAMI GOUNDER AND ANOTHER vs. M.GOVINDARAJU AND 4 OTHERS reported in 1995-1-L.W. 487 wherein a Division Bench of this Court has held:
"Right of an illegitimate child to succeed under Section 16(1) of the Hindu Marriage Act can arise only in a case in which marriage is proved to have taken place between the spouses, which may be null and void."
"Presumption of marriage under S.114, Evidence Act not to be drawn when facts show that no marriage could have taken place between the man and the woman, by rebuttal evidence."

14. The second judgment cited by the learned counsel for the respondent is one delivered in RAJAM AND FIVE OTHERS vs. CHIDAMBARAVADIVU AND 61 OTHERS reported in 2002-3-L.W.803 wherein also it has been held:

"Since the whole question revolves around the factum of marriage and when once the first appellant fails to establish this fact, the consequential rights for her children under Section 16(1) of the Hindu Marriage Act are not available to them."

"Invoking of the presumption of marriage from long cohabitation is not possible."

On such arguments, the learned counsel for the respondent would pray to dismiss both the above second appeals.

15. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, with the background of the facts and circumstances of the case traced herebefore and the evidence let in, in full consideration of the position of law laid down, the substantial questions of law are to be answered.

16. So far as the substantial questions of law are concerned, it must be said that basically it is essential to approach the case from the background of pleadings. The case of the respondent/plaintiff is that he is entitled to the entire suit property from his grandfather Dhoddegowdu and that the deceased first defendant not being the son of a lawful marriage in between his grandfather and the mother of the deceased first defendant, he is not entitled to any share in the suit properties which fall under two survey numbers and it is an admitted case on the part of the respondent/plaintiff that the deceased first defendant and his mother have been continuousl y living in the house located in one of the suit properties barring which all other lands falling under both items of suit properties are not only belonging to him but also in his possession and enjoyment. While so, since the deceased

first defendant on 30.7.1992 attempted to trespass into the suit lands, it had become necessary on his part to file the suit for declaration that he is entitled to the suit property in full and for permanent injunction restraining the defendant from in any manner interfering with his physical possession and enjoyment of the suit property.
17. On the contrary, the firm case of the deceased first defendant, on whose death the present appellants have been added as his legal representatives, is that the mother of the deceased first defendant was the second wife of the grandfather of the plaintiff, living in the family house of his grandfather i.e. located in one of the suit properties right from the year 1928 and not only continuing to live there but also they were in possession and enjoyment of the whole of the suit properties since they were allotted to the share of his mother in the division held within the family and therefore there is absolutely no question of any declaration or injunction as falsely prayed for on the part of the respondent/plaintiff.

18. Regarding the controversy raised by the plaintiff to the marital status of the mother of the first defendant, no doubt, the onus is heavily on him to prove to the effect that it was not a valid marriage from out of which the first defendant was born in spite of there being indication and to an extent admitted by the respondent himself that right from the beginning, the first defendant's mother and himself and their descendants from the days of the lifetime of Dhoddegowdu, the grandfather of the plaintiff, are living in the family house for the unbroken period of more than 50 years, regarding which there is no controversy at all. If really the mother of the deceased first defendant was a concubine of the grandfather of the plaintiff, there was absolutely no reason for him, particularly in those days, to keep her in the family house without any resistance and even after the death of the grandfather there was no reason for the respondent's father and for the respondent to have kept them there without the least resistance offered. Therefore, this plea that the mother of the first defendant was not properly married but she was only a concubine kept up by the grandfather of the plaintiff since being a fact put forth on the part of the plaintiff, no doubt, as per the evidence Act, the onus is heavily on him to prove to the effect that she was only a concubine and not married to his grandfather as the second wife, as it is claimed on the part of the plaintiff. Absolutely, no documentary evidence comes forth and scarcely some oral evidence has been let in by the plaintiff to the effect that she was only kept up as a concubine and not married to the grandfather of the plaintiff.

19. It all happened 70 years back and none of those who have been examined could have attended the marriage if it had been held and to speak to the personal attendance of the marriage and that it was not as a legally wedded wife by marriage the mother of the deceased first defendant was kept at the main residence of the family but only as a concubine and therefore it could only be held that the burden of proof of this question raised regarding the fidelity of the marriage in between the mother of the first defendant and the grandfather of the respondent/plaintiff was only on the plaintiff to prove which he has not established in a reliable manner with all preponderance of probability.

20. All the circumstances encircling the whole affair only prove to the effect that there is no point in doubting the fidelity of the marriage held in between Dhoddegowdu and the mother of the deceased first defendant and unless it is authoritatively established that there had been no marriage held in between them at all, which fact had been raised by the plaintiff regarding which the onus since being heavily cast on the plaintiff, it could only be held that the deceased first defendant was born from out of a legal marriage, his mother being the second wife of Dhoddegowdu since prior to 1955, there was absolutely no bar for such marriages and no other ambiguous, slipshod or erroneous conclusion could be arrived at particularly when they were residing in the family house as part and parcel of the family all along and therefore there is no point in doubting the fidelity of a marriage which is said to have been held in the year 1928. Therefore, it is only desirable to conclude that the deceased first defendant was born from out of the lawful wedlock and nothing else as it has been raised on the part of the plaintiff, which he has not established in law or on facts in a reliable manner.

21. Coming to the permanent injunction sought for by the plaintiff, on facts, it could very easily be decided that it is only the allegation of the plaintiff that he is in possession and enjoyment of the land surrounded by the house further admitting the possession of the defendants not only in the house but also in the lands but letting in evidence to the effect that they took forcible possession of the same causing production of documents like kist receipts, adangal extracts, UDR patta etc. and so far as these documents are concerned, the case of the defendants is that the plaintiff and his ancestors being the traditional Village Munsifs of the village, they have not only created these documents in their favour artificially but also made entries effected in the revenue records by manipulation and fraud. One glaring example to prove the truthfulness of this statement could be given taking into consideration of Ex.A.1 dated 28.11.1996 and Ex.A.13 which are the UDR pattas issued in favour of the plaintiff's father for both the items of properties.

22. It is an open secret that UDR patta could be issued only in favour of persons who are in actual possession and enjoyment of the property on physical verification of the same on ground and when it is the admitted case that it is only the defendant and his family members who are occupying the only house in the suit property further claiming to be in possession and enjoyment of the entire land cultivating the same with different crops, how the UDR patta could be issued in favour of the plaintiff's father is a mystery and therefore this itself is sufficient to prove that not only these exhibits but also the kist receipts and other adangals have been freely created in favour of the plaintiff's family members based on which the case in hand cannot be decided. Therefore, regarding possession, the case of the plaintiff has been rightly rejected by the trial Court. On the contrary, the first appellate Court, even though it rejected the evidence, still, has arrived at an erroneous conclusion to hold that the plaintiff is not only entitled to the property but also in possession of the suit property thus granting the relief of permanent injunction which cannot be done in law or on facts.

23. It must be told that the plaintiff simply creating a doubt regarding the second marriage held in between his grandfather Dhoddegowdu and

the mother of the deceased first defendant, has come forward to squander away the properties allotted in the family arrangement in favour of the second wife and his son, the deceased first defendant, purposely creating false and bogus documents in their favour in an orchestrated manner without being either entitled to or in physical possession and enjoyment of the same. Having not come to the Court with clean hands, the plaintiff is not at all entitled to the relief sought for, be it regarding the declaration of his title to the suit properties or regarding permanent injunction that he is in possession and enjoyment of the same. Therefore, in these circumstances, the only conclusion that could be arrived at regarding the above substantial questions of law is that the plaintiff has failed to discharge his burden to the title of the property or even to the possession and hence these substantial questions of law regarding both declaration and permanent injunction have to be decided in favour of the appellants and against the respondent and hence the following judgment:

In result,
(i)both the above second appeals succeed and they are allowed with costs throughout.
(ii)The common judgment and decrees dated 30.11.1998 rendered in A.S.No.8 of 1998 and Cross Appeal No.2 of 1998 by the Court of Subordinate Judge, Hosur and the judgment and decree dated 19.12.1997 rendered in O.S.No.809 of 1993 by the Court of District Munsif, Denkanikottai are hereby set aside.
(iii)The suit in O.S.No.809 of 1993 on the file of the Court of District Munsif, Denkanikottai stands dismissed.

Consequently, C.M.P.No.14623 of 1999 is closed.

Index: Yes
Internet: Yes

Rao

To
1.The Subordinate Judge,
Hosur.

2.The District Munsif,
Denkanikottai.